Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court held that a prisoner alleging ineffective assistance of counsel under the Sixth Amendment must overcome the strong presumption that his trial counsel's conduct, including conduct relating to investigations, "might be considered sound trial strategy[]" and that counsel's conduct must be evaluated from counsel's perspective at the time without the temptation to second-guess or the "distorting effects of hindsight[.]" In *Burger v. Kemp*, 483 U.S. 776 (1987), this Court held that there was a "reasonable basis" for trial counsel's strategic decision not to call the defendant's mother as a witness since he concluded her testimony would be unhelpful and potentially counterproductive. Trial counsel in the instant capital case did not present evidence of the family abuse experienced by the defendant's mother and the defendant as mitigating evidence because "he did not know what [the mother] would say[,]" "she had denied the abuse[,]" she had twice lied to the police about the defendant, neither defendant nor the mother were forthcoming about her "prior life[,]" and he did not want to open the door to damaging background information that the mother knew about Karis. The Ninth Circuit Court of Appeals held that counsel's decision was not a reasonable strategic decision and vacated the penalty phase for ineffective assistance of counsel. The questions presented are:

1. Whether the Ninth Circuit's reversal of a penalty phase for ineffective assistance of counsel conflicts with *Strickland v. Washington* and *Burger v. Kemp*, since trial counsel opted not to investigate further, or introduce in mitigation, evidence that the defendant and the defendant's mother had been abused, for the strategic reason that the mother had denied the abuse, had lied to the police, neither the defendant nor his mother wanted counsel to pursue the mother's

"prior life[,]" and counsel did not want to open the door to damaging background information that the mother knew about Karis.

2. Whether the Ninth Circuit is engaging in a mode of analysis of ineffective assistance of counsel which conflicts with *Strickland v. Washington* and *Burger v. Kemp* by utilizing "hindsight" and second-guessing to reject trial counsel's articulated tactical reasons for choosing to conduct a "less than complete" investigation when, under the circumstances at the time of trial, those express reasons are sufficient to support the strong, deferential presumption that trial counsel's conduct "***might*** be considered sound trial strategy[.]" (Emphasis added.)

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IN THE SUPREME COURT OF THE UNITED STATES

No.

JEANNE WOODFORD, *Petitioner,*

v.

JAMES LESLIE KARIS, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin (hereafter the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, Appendix ("App.") A, is reported at *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002). The orders denying rehearing and denying rehearing en banc are unreported. App. D, E.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief as to the penalty phase of this capital case was entered on March 18, 2002. The parties' petitions for rehearing and suggestions for rehearing en banc were denied May 2, 2002. On July 21, 2002, Justice O'Connor extended the State's time

to file a certiorari petition to and including August 30, 2002. On July 23, 2002, Justice O'Connor extended Petitioner Karis's time to file a certiorari petition to and including August 30, 2002.[1] On August 20, 2002, Justice O'Connor extended the State's time to file a certiorari petition to and including September 13, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF CASE

In 1981, Karis abducted two women, Ms. P and Ms. V, at gunpoint in broad daylight from a California street. He drove them to a remote area, ordered them to disrobe, raped Ms. V, and shot them both down from behind. Ms. P died, but Ms. V survived. Karis was convicted of murdering Ms. P, attempting to murder Ms. V, raping Ms. V, and kidnapping both women. The jury found true the special circumstances that Karis murdered Ms. P while engaged in the commission of a kidnapping and in the immediate flight from a rape.

Prior to the penalty phase, Karis's counsel investigated the possibility of presenting evidence that Karis and his mother had been abused. App. A at 57, 58-59, 60-61 (Kleinfeld, J.,

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1. Hereafter Karis (who is the Respondent with respect to this petition) shall be referred to as "Karis."

dissenting). A defense mental examiner opined that this environment "set the scene for the development of an acceptance of violence as the solution to social and interpersonal problems and a low opinion of women." App. A at 41-42 (quoting majority opinion). However, Karis's counsel decided not to call the mental examiner as a witness since there was the risk that the examiner would also have to disclose evidence damaging to Karis. App. A at 41-42.

In the penalty phase, the jury considered, inter alia, aggravating evidence that Karis had two prior separate rape convictions. App. C at 11. Karis's counsel called several witness and "elicit[ed] that Karis had exhibited artistic and academic talent, that his mother had been divorced and that he had saved his brother drowning when he was a child." App. A at 40-41. Karis's mother testified on her son's behalf that Karis saved his brother from drowning, but Karis's counsel did not ask her any questions about abuse. App. A at 42; App. C at 13.

After the California Supreme Court affirmed the judgment, pursuant to 28 U.S.C. § 2254, Karis filed a petition for writ of habeas corpus in federal court in 1990. App. A at 15. Karis raised a number of claims of ineffective assistance of counsel at the penalty phase. App. C at 69-104, 145-152.

Ultimately, the district court conducted an evidentiary hearing on Karis's claims of ineffective assistance of counsel in the penalty phase. *See* App. C at 69-104, 145-152. Karis's counsel testified by deposition that he did not ask Karis's mother about the abuse at the penalty phase "because he did not know what she would say and that she had denied the abuse." App. A at 42; *see also* App. C at 76. Both Karis and his mother "[f]or whatever reason," did not want to tell counsel "the full extent" of her prior life. App. A at 43.[2] Additionally, counsel

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2. Karis's mother testified by deposition that Karis's counsel never asked her about abuse and that if he had she would have testified about it. App. A at 42; App. C at 76-77.

did not want to open the door to damaging background information that the mother had about Karis. Opening Brief of Respondent – Cross-Appellant/Appellee ("OBR"), filed in the Ninth Circuit, at 94; Excerpts of Record ("ER"), filed in the Ninth Circuit, at 259.

In 1998, the district court rejected all but one of Karis's penalty-phase ineffective counsel claims. App. B at 3-4 (adopting magistrate's findings in full); App. C at 69-104, 145-152, 159. Despite the testimony of Karis's counsel, the district court granted Karis's petition on the basis of ineffective assistance of counsel in the penalty phase on the sole ground that Karis's counsel failed "adequately to investigate Karis' childhood, family situation and the serious abuse he suffered, and watched his mother suffer as a child . . . ." App. A at 37; *see also* App. C at 91-92, 95-96. The district court found no downside to presenting evidence of abuse and that Karis's trial counsel had offered no rational justification for failing to investigate family abuse. App. A at 37; App. C at 91-92.

In a split decision, the Ninth Circuit affirmed the district court. App. A at 7, 55; *see also* App. A at 56 (Kleinfeld, J., dissenting). The Ninth Circuit agreed that Karis's counsel reasonably decided not to call the mental examiner to testify about abuse. App. A at 41-42. However, the majority opinion held that even if Karis's mother herself had denied the abuse to counsel and was a potentially unpredictable witness on this subject, Karis's counsel was ineffective since he failed "to investigate the abuse through other family members and witnesses . . . ." App. A at 42. The Ninth Circuit majority faulted counsel for not explaining to Karis's mother "the gravity to her son in not testifying about the abuse." App. A at 43.

In dissent, Judge Kleinfeld chided the majority for

Neither the district court nor the Ninth Circuit found it necessary to resolve this conflict in the evidence. App. A at 42; App. C at 76-78.

treating "counsel's failure to put on evidence of an abusive childhood as *per se* ineffective assistance, without the deference to defense counsel's judgments required by *Strickland v. Washington.*" App. A at 56 (footnote omitted). "The problem in the majority's analysis arises because counsel investigated and discovered the abuse, but was precluded both by tactical considerations and by lack of cooperation from his witnesses from presenting it." App. A at 57. The dissent found Karis's case indistinguishable from this Court's opinion in *Burger v. Kemp*, 483 U.S. 776. App. A at 58-61.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit has decided an important federal question in a way that conflicts with this Court's decision in *Burger v. Kemp,* 483 U.S. 776. The majority opinion reversed Karis's death sentence because of defense counsel's purportedly unreasonable failure to investigate and present mitigating evidence at the penalty phase. However, Karis's trial counsel opted not to introduce evidence of family abuse in mitigation for the strategic reason that Karis's mother had denied the abuse, had lied to the police, and neither Karis nor his mother wanted counsel to pursue the mother's "prior life." Additionally, counsel was concerned that extensive questioning of Karis's mother at the penalty phase would open the door to damaging background information that she had about Karis. The Ninth Circuit's rejection of this express strategy directly conflicts with *Burger*.

This decision is only the latest manifestation of a general pattern of analysis regarding ineffective assistance of counsel which conflicts with both *Strickland* and *Burger* by using "hindsight" to second-guess defense counsel's articulated tactical reasons. This analysis fails to accord the strong, deferential presumption that trial counsel's conduct might be considered sound trial strategy given the circumstances

confronting counsel at the time of trial. In particular, the Ninth Circuit fails to give the required heavy measure of deference to defense counsel's expressed reasonable professional judgment to conduct "less than complete" investigations into potential defenses and mitigating evidence.

SUMMARY OF ARGUMENT

I.

THE NINTH CIRCUIT'S DECISION THAT KARIS'S COUNSEL UNREASONABLY DECIDED NOT TO FURTHER INVESTIGATE OR PRESENT EVIDENCE OF CHILDHOOD ABUSE IN THE PENALTY PHASE, DESPITE COUNSEL'S ARTICULATED SOUND TRIAL STRATEGY, AMOUNTS TO A "NO MEASURE OF DEFERENCE" STANDARD FOR DEFENSE COUNSEL'S DECISIONS AS TO THE EXTENT AND LIMITATIONS OF DEFENSE INVESTIGATION

This case presents an ongoing question of the degree of deference to be accorded to a defense attorney's "strategic choice" to conduct a "less than complete" investigation of the law and facts relevant to plausible options in a case. *Strickland,* 466 U.S. at 690-91. Notwithstanding the reasonable explanation of Karis's defense counsel for his decision not to further investigate or present evidence of abuse experienced and witnessed by Karis during his childhood, the Ninth Circuit held that Karis's counsel's decision was objectively unreasonable. The decision also directly conflicts with this Court's decision

in *Burger v. Kemp*, 483 U.S. 776. App. A at 58-61 (Kleinfeld, J. dissenting). More significantly, the Ninth Circuit's decision guts the "heavy measure of deference" to be accorded counsel's "reasonable professional judgment" as to the extent and limits of trial preparation.

The easiest way to analyze the ominous implications of the Ninth Circuit's decision is to compare it with this Court's decision in *Burger v. Kemp*. In *Burger*, defense counsel offered no mitigating evidence even though there was evidence that Burger had an exceptionally unhappy and unstable childhood. Burger's attorney was aware of some of this family history. He talked to Burger's mother, a friend of Burger's, and a psychologist. Unfortunately, the psychologist opined that Burger's psychopathology would make him want to do wrong. The *Burger* court concluded that defense counsel's decision not to call any witnesses "may have been erroneous" but was not unreasonable. App. A at 58-59 (Kleinfeld, J., dissenting), quoting *Burger*, 483 U.S. at 788-93. While the *Burger* court concluded that counsel could have undertaken a more thorough investigation, the decision to interview no further witnesses was not constitutionally deficient, and the decision "not to mount an all-out investigation" was supported by "reasonable professional judgment." *Burger*, 483 U.S. at 794-95.

Karis's counsel did far more than Burger's, yet the Ninth Circuit found his conduct unreasonable. Karis's counsel actually did present mitigating evidence and did interview family members. *See* OBR at 22-23 (defense case); RT[3] 2511-2512, 2517-2528, 2530, 2531, 2533; OBR at 54-70; *see especially* OBR at 54-55, 56, 68-70.[4] Counsel was also aware of information that Karis had been abused and had witnessed

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3. "RT" refers to the reporter's transcript of the 1982 trial.

4. Counsel's efforts include the efforts of guilt-phase counsel. OBR at 68-70.

the abuse of his mother. App. A at 41. However, the mental examiner who provided the information could not testify because he would have had to also present evidence damaging to Karis. *See* App. A at 41-42. Furthermore, Karis's mother denied the abuse. OBR at 56-57; *see also* App. A at 42 (noting counsel's testimony). She was an unpredictable witness because of mixed motives concerning her relationship with Karis's stepfather and because she had previously lied to the police about Karis. App. A at 64 (Kleinfeld, J., dissenting); OBR at 95; ER at 260, 307; Supplemental Excerpts of Record ("SER"), filed in the Ninth Circuit, at 5120-5121. Karis's counsel ran genuine risks if he chose to present evidence of abuse. If he asked Karis's mother about the abuse at the penalty phase, it is possible that she might have denied the abuse. Alternatively, her testimony might have opened the door to damaging background information she had about Karis. OBR at 94 (a robbery Karis was involved in as a juvenile; his military discharge; his attempted prison escape; his involvement in a prison incident–which resulted in a killing).

If other witnesses had been used to elicit the abuse evidence, but Karis's mother was not asked about it, or if she was asked and denied it, the absence of such testimony or her denials might at a minimum have struck the jury as suspicious. As with *Burger*, the decision of Karis's counsel not to "mount an all-out investigation" was supported by reasonable professional judgment. In dissent, Judge Kleinfeld states correctly that in spite of the Ninth Circuit majority's conclusion that Burger's lawyer acted more strategically than Karis's,[5/] "there is simply no way to avoid the force of *Burger* in this case." App. A at 59-60.

The majority's problem with counsel's performance boils down to criticizing counsel for failing to pursue an abuse-mitigation strategy by somehow failing to convince Karis's

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5. App. A at 51 (majority opinion).

mother to testify about the abuse, or finding alternative witnesses to the abuse in lieu of Karis's mother. App. A at 42, 43. Yet, from the standpoint of Karis's counsel at the time of trial, these tactics posed serious risks due to the unpredictability of Karis's mother on this issue and the potential for impeachment. Given that this Court found Burger's counsel competent despite less preparation and less presentation of mitigating evidence, there is no way to characterize the *Karis* decision as anything but inconsistent with *Burger*.

The Ninth Circuit's decision in this case penalizes an attorney for declining to act against his better judgment. The attorney in this case articulated a tactical reason and the majority rejects that reason by speculating "[h]ow much more effective" it would have been to do it a different way. App. A at 51. Yet, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Nonetheless, the opinion in this case applies a retrospective analysis of "what ifs," "if onlys," and "what might have beens. . . ." The opinion will inevitably lead to the pitfalls of over-intrusive post-trial inquiry into attorney performance which this Court warned against in *Strickland* including "dampen[ing] the ardor and impair[ing] the independence of defense counsel, discourag[ing] the acceptance of assigned cases, and undermin[ing] the trust between attorney and client." *Strickland*, 466 U.S. at 690.

II.

THE NINTH CIRCUIT IS ENGAGING IN A GENERAL MODE OF ANALYSIS WHICH CONFLICTS WITH *STRICKLAND* AND *BURGER* BY USING HINDSIGHT TO SECOND-GUESS COUNSEL'S ARTICULATED TACTICAL REASONS FOR CONDUCTING "LESS THAN COMPLETE" INVESTIGATIONS WHICH "MIGHT" ACTUALLY CONSTITUTE SOUND TRIAL STRATEGY

On its own terms, the Ninth Circuit's *Karis* opinion is wrong. However, its significance is magnified when it is viewed as the apex of a pyramid of cases in which the Ninth Circuit has second-guessed counsel's decisions and applied the fabled twenty-twenty vision of hindsight, rather than applying the strong deferential presumption that trial counsel's conduct "'**might** be considered sound trial strategy.'" *Strickland v. Washington*, 466 U. S. at 689 (emphasis added); *Bell v. Cone*, __U.S.__, 122 S.Ct. 1843, 1852 (2002). The Ninth Circuit's opinion manifests an "absolute" proposition that a "less than complete investigation" of potential mitigation is unreasonable even if "reasonable professional judgments support the limitations on investigation." *Strickland*, at 690-91. Rather than viewing counsel's conduct in light of the circumstances existing at the time of trial, the Ninth Circuit utilizes an impermissible retrospective approach based on evidence presented years after the trial.

As already noted, Karis's trial counsel testified via deposition and explained the reasons why he did not ask Karis's mother any questions about past abuse. Despite what she may or may not have told Karis's mental examiner, Karis's counsel

remembered that Karis's mother denied that any abuse had occurred, and he did not know what she would say if she was asked about the subject at the penalty phase. App. A at 43. He also described Karis and his mother as resistant to telling him the full extent of the mother's prior life. App. A at 43.

Karis is not an isolated case in which the Ninth Circuit did not accord the presumption that trial counsel's conduct **might** be considered sound trial strategy. *See, e.g., Caro v. Calderon*, 280 F.3d 1247, 1257 (9th Cir. 2002) (*Caro II)* ("We have held that 'all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase.'"), quoting *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999) (*Caro I*) (Caro was examined by four experts before trial; none of them indicated that Caro suffered from a mental impairment severe enough to constitute legal insanity or diminished capacity [*Caro I*, 165 F.3d at 1226]; nevertheless, the Ninth Circuit found that trial counsel had unreasonably failed to investigate the effects of exposure to pesticides on Caro's mental health [*Caro II*, 280 F.3d at 1257-58]; *see also Caro II*, 280 F.3d at 1259-60 [Kleinfeld, J., dissenting]); *Silva v. Woodford*, 279 F.3d 825, 837-40 (9th Cir. 2002) (in order to preserve trust with defendant, counsel chose not to investigate background evidence when defendant threatened to disrupt the trial and make the jury hate him if counsel contacted his parents); *Phillips v. Woodford*, 267 F.3d 966, 972, 978-80 (9th Cir. 2001) (the Ninth Circuit held that the attorney did not exercise sound trial strategy in deciding not to investigate other potential defenses even though the defendant told him his defense was alibi); *see also Phillips*, 267 F.3d at 988, 993 (Kleinfeld, J., dissenting) (Judge Kleinfeld notes that counsel found a witness tending to support the alibi); *Jennings v. Woodford*, 290 F.3d 1006, 1013-16 (9th Cir. 2002) (Ninth Circuit found unreasonable trial counsel's decision not to conduct investigation into potential mental defenses after being informed by prior counsel that a preliminary mental health exam had revealed that Jennings was "okay"); *Wade v.*

Calderon, 29 F.3d 1312, 1323-25 (9th Cir. 1994) (counsel unreasonable for summoning defendant's alternative personality during penalty phase in order to demonstrate mitigating factor of extreme mental or emotional disturbance); *see also Wade*, 29 F.3d at 1336, 1341-43 (Trott, J., dissenting); *Jackson v. Calderon*, 211 F.3d 1148, 1161-62 (9th Cir. 2000) (counsel unreasonably failed to investigate and produce evidence of difficult childhood even though defendant did not provide any such information and defendant's wife described defendant's relationship with his mother as good and affectionate); *see also Jackson*, 211 F.3d at 1166-67 (O'Scannlain, J., dissenting); *Visciotti v. Woodford*, 288 F.3d 1097, 1103, 1113-14 (9th Cir. 2002) *petition for cert. filed* 71 USLW 3117 (U.S. July 19, 2002) (No. 02-137); *petition for cert. filed* (U.S. July 22, 2002) (No. 02-5538) (Ninth Circuit found that counsel's conclusion that no jury could feel sympathy for Visciotti was an unreasonable basis for counsel to decide not to conduct an investigation into Visciotti's background to pursue a "sympathy defense"); *compare Strickland v. Washington*, 466 U.S. at 699 (counsel's decision not to further investigate defendant's background and mental health was reasonable given, inter alia, counsel's feeling of hopelessness about the success of such evidence); *see also Rios v. Rocha*, 299 F.3d 796, 805-07 (9th Cir. 2002) (counsel's expressed decision to present an unconsciousness defense over a misidentification defense made after talking to the defendant, reading the police report of the offense, reviewing a psychological report of the defendant and speaking to one eyewitness, according to the Ninth Circuit, constituted deficient performance); *see also Rios*, 299 F.3d at 814-15 (Fernandez, J., dissenting); *Gentry v. Roe*, ___ F.3d ___, No. 00-55691 (9th Cir. Aug. 8, 2002) [2002 WL 1808309] (despite weakness of defendant's testimony, majority finds defense counsel made unreasonable tactical choice in arguing that only the actual participants, not the attorneys, knew what really happened during the crime); *see also Gentry*, ___ F.3d ___ (Silverman, J., dissenting).

This Court has "consistently declined to impose mechanical rules on counsel. . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). However, the Ninth Circuit's general rule requiring all mitigating evidence to be "unearthed" for the penalty phase is a "scorched earth" investigative rule that gives no deference to the "reasonable professional judgments"of counsel in the Ninth Circuit. *Strickland,* 466 U.S. at 690-91.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Dated: September 13, 2002

Respectfully submitted,

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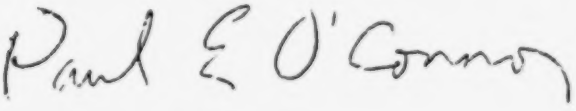

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